Bridging the gap: the MPIA as a valuable short-term solution to the impasse of the WTO's Appellate Body?

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"At the core of a well-functioning multilateral trading system is an effective dispute resolution mechanism", emphasized Appellate Body Member Peter Van den Bossche in his farewell speech. Reality in the WTO stopped mirroring this aspiration when the Appellate Body became defunct in late 2019 following a stalemate in the Dispute Settlement Body (DSB) over the appointment of new Appellate Body Members.

Apart from the demise of the Appellate Body, the departure of Director General (DG) Roberto Azevêdo well before the end of his second term in 2021 has added to the pile of unsolved challenges in the WTO. While diplomats in Geneva have been focusing on searching for a new DG in previous months, the Appellate Body crisis is unlikely to end any time soon as the US continues to block the consensus necessary to fill any vacancies. Instead of providing a secure and predictable dispute settlement system as stipulated in Art. 3.2 Dispute Settlement Understanding (DSU), concerns about appeals "into the void" have emerged in academic discussions and soon materialized, e.g. in *US – Carbon Steel (India)* and most recently in *US – Softwood Lumber VII*.

In the meantime, the EU has succeeded in convincing (at the time of writing) 24 WTO Members to create the multi-party appeal arbitration agreement (MPIA) based on Art. 25 DSU. The MPIA is intended to prevent appeals "into the void" by providing for a viable substitute of appellate review under WTO law for those WTO Members still interested in a two-tiered dispute settlement system. This rationale informs the temporal character of the MPIA, though hope is dwindling in light of the political realities that a return to the old "normal" of WTO trade dispute settlement will be possible in the near future. So far, WTO Members have little experience with Art. 25 DSU arbitration as there has only been a single case settled in the history of the DSU by resort to arbitration. Nonetheless, given the lack of alternatives within the existing system, James Bacchus, former Appellate Body Member found Art. 25 DSU arbitration to be "the best option, given all the lousy options we have left."

The basic characteristics of the MPIA

The MPIA is a political arrangement structured in three parts. The first part has been issued as a political communication to the DSB that includes core-principles and substantive elements of the MPIA's appeal mechanism. The second part (Annex 1) sets out a model template of agreed procedures for arbitration under Art. 25 DSU. Any procedure can be still modified to meet the needs of each individual dispute under the MPIA, even though only within the limits prescribed by the DSU

(a requirement that follows from Art. 25 DSU). The third part of the MPIA (Annex 2) concerns the selection process of MPIA-arbitrators (see here for a full list of the ten newly selected MPIA arbitrators).

Three key innovations of the MPIA

The MPIA includes three important innovations and takes up some of the (US-)criticism regarding the Appellate Body outlined in depth by a USTR report released earlier this year. First, the model template in Annex 1 responds to the controversial 90 days maximum deadline to issue reports under Art. 17.5 DSU. As the US claims, the Appellate Body has not managed to keep up with the 90 days deadline in cases since 2014. Under Annex 1 of the MPIA, in contrast, arbitrators can only extend the 90 days deadline with the support of the disputing parties (para 14). On top, para 12 of Annex 1 allows to use of page limits, deadlines and limits on the number and length of hearings for arbitrators to meet the 90 days deadline. Despite these efforts, it remains to be seen whether such measures actually allow to do justice to the legal issues in question and help to deal with highly complex legal issues in a timely manner. The complexity of cases has been identified as one of the root causes for the Appellate Body's struggles to keep up with the deadline, and it is unlikely that cases will be less complex in the future.

Second, para 10 of Annex 1 reminds arbitrators to limit their legal assessment on issues necessary for the settlement of a dispute and not to engage in *obiter dicta*-like discussions – another allegation against the Appellate Body's dispute settlement practice as raised by the US.

Third, the template in Annex 1 includes another element to enhance judicial economy. In contrast to Art. 17.12 DSU which obliges the Appellate Body to consider "each of the issues raised", the MPIA encourages arbitrators to foster judicial economy by proposing e.g. the exclusion of claims to the disputing parties (para 13) in order to adhere to the 90 days period.

Open questions

Two open questions have remained since the MPIA was notified to the WTO on 30 April 2020.

At the time of writing, details regarding administrative and legal support for MPIA arbitrators have not been determined. The MPIA (see para 7) lacks any specifics on how to exactly compose or organize supporting staff. So, as possible options, one may rely on staff that works e.g. on a permanent supporting basis, on an *ad hoc* basis or arbitrators could pick their own legal clerks and administrative aides.

As the MPIA is tied to Art. 25 DSU which explicitly includes arbitration as an alternative route to WTO dispute settlement, parties "requested" the WTO's DG for the organization and funding in support to arbitrators in the communication to the DSB (see para 7). This approach seemed to envisage the opportunity to resort to WTO staff as legal and administrative support for MPIA arbitrators given that the impasse of the Appellate Body has freed up financial and human resources at the

Appellate Body Secretariat. The US, however, has explicitly opposed the MPIA parties' idea of creating a separate WTO Secretariat division for matters of Art. 25 DSU disputes. In a letter sent to then-DG Azevêdo, the US argued that Art. 25 DSU did not cover "WTO Secretariat support to an arbitrator". Thus, it remains unresolved for now how MPIA parties will organize and finance legal and administrative staff.

Another open question relates to the parties to the MPIA. Though important WTO Members such as China, Brazil, Canada and Mexico have agreed to take part in the MPIA and para 12 of Annex 1 invites any WTO Member to join the MPIA at any time, other important global powers such as Russia, India and the US are not part of the MPIA. In the *EU – Cost Adjustment Methodologies II (Russia)* case, the absence of Russia as a party to the MPIA has provoked a somewhat odd outcome as it was the EU that filed a notice of appeal "into the void". The EU, being aware of its (at first sight) contradictory move, invited Russia to move on in this case through Art. 25 DSU arbitration and to join the MPIA (see page 11 of the notice of appeal). However, there is no obligation for Russia to eventually resort to Art. 25 DSU arbitration. At the same time, a legislative update to the EU's Enforcement Regulation is underway so that the European Commission is legally equipped under EU law to resort to unilateral measures if another WTO member "appeals into the void" and is not willing to resort to Art. 25 DSU arbitration.

Broader perspective on trade dispute settlement

In terms of the broader picture of international trade dispute settlement, one may argue that the MPIA's biggest shortcoming is its purpose of preserving the spirit of the DSU's two-staged dispute settlement procedure. Clearly, the MPIA is an arrangement that can help to prevent unilateral enforcement and therefore can be deemed as political signal in support of the WTO's two-tiered dispute settlement system. Nevertheless, it should be noted that the elephant in the room remains the US' deviating vision of dispute settlement as performed under the GATT 1947 model. Back then, the dispute settlement procedure had a highly diplomatic character, allowed parties to veto panel reports without no appeal stage. For this reason, it does not surprise that the US has already rejected the MPIA because it "would perpetuate the failings of the Appellate Body". As there is currently no common denominator on this issue, the MPIA could turn (despite its intended temporal nature) into a long-term solution for those WTO Members that are still interested in the two-tiered DSU mechanism. Meanwhile, China is testing new approaches to trade dispute settlement in the context of its Road and Belt Initiative which reveal a strong preference for soft law and contract-based solutions to disagreements or arbitral approaches to settle trade (and investment) disputes. In between the US' and China's visions, the EU's and other MPIA parties' efforts to return to a functioning Appellate Body might not be capable to counteract the ongoing geopolitical changes and their implications on trade dispute settlement.